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No. 979

In the Supreme Court of the United States

OCTOBER TERM, 1967

LANG KINSEY, *Petitioner*

vs.

FLOYD HUGGINS, *Et Al, Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS AT SAN ANTONIO

BRIEF FOR RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The Supreme Court of Texas did not write a formal opinion, but refused Petitioner's Application for a Writ of Error by the entry of an order dated October 4, 1967 (Tr. I; Petr.'s App. p. A-10); The decision and opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, reversing the judgment of the trial court and remanding the cause for trial on the merits is reported at 414 S.W. 2d 208, and is correctly embodied in the Petition as Exhibit 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether a substantial Federal question is presented by the Petitioner's contention that **Pennoyer v. Neff,** 95 U.S. 714 (1878) has been so "greatly mitigated" by subsequent decisions so as to no longer be authoritative?

Whether the decision of the Court of Civil Appeals of Texas is supported by an independent and adequate non-federal ground?

STATUTES AND RULES INVOLVED

Articles 2031b (Sec. 3), 2039a (Sec. 5) of the Revised Civil Statutes of Texas, 1925, as amended, and Rule 108 of the Texas Rules of Civil Procedure are contained in the Appendix to the Respondents Brief in Opposition.

STATEMENT OF THE CASE

Petitioner brought an action in personam for damages resulting from personal injuries sustained in an automobile accident occurring within the State of Texas (Tr.A-2,3,4). The only citation issued to Respondent was a "non-resident notice" (under Tex. R. Civ. P. 108) which was purportedly served upon him in the State of Kansas (Tr. A-2,12), the state of his residence. Respondent was never served while he was present in the State of Texas nor was any citation served upon any agent of Respondent. A default judgment was taken against Respondent upon such "notice" (TR.A-15). Respondent made no appearance in any Texas court until he moved to set aside such default judgment by filing his Petition for a Writ of Error (Tr.A-16, 17, B). The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas set

aside the default judgment and remanded the cause to the trial court for a new trial, basing its decision on two premises, to-wit:

(1) The cases of **Hess v. Pawloski,** 274 U.S. 352 (1927); **Millikin v. Meyer,** 311 U.S. 457 (1940); **International Shoe Co. v. State of Washington,** 326 U.S. 310 (1945), and **McGee v. International Life Ins. Co.** 355 U. S. 220 (1957) are distinguishable from **Pennoyer v. Neff, supra,** in that those cases "involve the construction of certain state statutes providing for methods of service upon non-residents, chiefly of the nature of our Non-Resident Motorist Act, Art. 2039(a), R.C.S., and our so-called "Long-Arm" Statute, Art. 2031(b), R.C.S. . . .", that **Pennoyer, supra,** had been followed by our Texas Supreme Court and that the Petitioner had cited no Texas case overruling the Texas cases following **Pennoyer, supra.**

(2) Texas law holds that the "notice" purportedly served on Respondent pursuant to **Rule 108, T.R.C.P.,** "will not lend validity" to a personal judgment taken against a non-resident of Texas. (Tr.E-1-4; Petr.'s App. Ex. 1).

The Court of Civil Appeals denied the Petitioner's Motion for Rehearing (Tr. F-1), the Supreme Court of Texas refused Petitioner's Application for a Writ of Error, and, subsequently, the Motion for Rehearing of same (Tr. I).

ARGUMENT

1. There is no substantial Federal question presented by the Petitioner's contention that **Pennoyer, supra,** is no longer authoritative law. Petitioner has cited no cases overruling **Pennoyer, supra.** The cases that Peti-

tion has cited (**Hess, McGee, supra,** etc.) are readily distinguishable on both their facts and holdings. Further, Petitioner has not pointed to any conflict of decision in either the State or Federal judiciaries. As the Texas Court of Civil Appeals noted, the cited cases do not stand for the proposition that this type of notice is effective service in an action in personam. Rather, these cases deal with the construction and interpretation of various "Long Arm Statutes", the "Minimum Contacts Doctrine", or when a non-resident has, either voluntarily or involuntarily, appointed a state official to be his agent for service of process.

In addition, Rule 108, is merely a Texas rule of procedure, and is not a substantative law. Art. 2039(a) R.C.S., commonly known as the Non-Resident Motorist Act, provides the **sole,** not merely one, means of obtaining service of process upon a non-resident motorist in any civil action growing out of any accident while such non-resident was operating a motor vehicle within this State. Section 5 of this Statute provides:

> **"No judgment by default shall be taken in any such cause or action, suit or proceeding, until after the expiration of at least twenty days after such process shall have been served upon the chairman of the State Highway Commission as herein provided,** and the presumption shall obtain, unless rebutted, that such process was transmitted by the chairman of the State Highway Commission and received by Defendant after being deposited in the mail by the chairman of the State Highway Commission." (emphasis added)

The Chairman of the Texas Highway Commission was never served with any process in this case.

2. The decision of the Court of Civil Appeals is

supported by an independent and non-federal ground in that that court specifically held that Texas law provides that this means of service is inadequate to vest jurisdiction over the non-resident defendant. The court cited three cases in support of this statement; **Bonanza, Inc., v. Lee,** 337 S.W. 2d 437, (Tex.Civ.App.1960) no writ hist., **Henry v. Reno,** 401 S.W. 2d 118 (Tex.Civ. App. 1966) writ ref. n.r.e. and **Roumel v. Drill Well Oil Company,** 270 F.2d 550 (5th Cir. 1959). In **Roumel, supra,** the Court stated:

> "It is clear that Texas has not attempted, by Rule 108 of its Rules of Civil Procedure or by any means, to vest jurisdiction in its courts to render personal judgments against non-residents. Wherever it has been drawn in question, Rule 108 has been held to be nothing more than a notice to a non-resident of the pendency of a suit **involving property** within the State of Texas." At 554. (Emphasis added)

The Court of Civil Appeals in the case at bar also noted that a recent Texas case clearly held that notice purportedly served on a non-resident, pursuant to Rule 108, did not bring the non-resident defendant within the jurisdiction of the state court, so that an in personam action could be prosecuted against him, citing **Henry, supra.**

3. The Court of Civil Appeals correctly held that under both State and Federal decisions, the purported "notice" given Respondent was not effective personal or substituted service and, therefore, the trial court had no jurisdiction over the person of the Respondent. As the Court of Civil Appeals noted, and as the Petitioner there conceded (Tr. D-17), had the provisions

of Article 2039a (the Texas Non-Resident Motorist Act) been employed, Petitioner could have obtained service and thereby vested the trial court with personal jurisdiction over the Respondent. The Petitioner, however, chose to rely on a procedural rule that had been held by both Federal and Texas courts to be an ineffective method of obtaining service on a non-resident defendant. The Court of Civil Appeals noted that no case had been cited in which the principles of the **Pennoyer, supra,** had been overruled. Therefore, the court held that such "notice" was indeed invalid service. Clearly, this decision was correct.

Petitioner contends that the landmark decision in **Pennoyer, supra,** has been "greatly mitigated" by the more recent decisions of this Honorable Court, such as **Hess, Milliken, supra,** etc. The Respondent disagrees. The doctrine of **Pennoyer, supra,** is still the law and state lines may not be crossed for service of process upon non-residents. The cases Petitioner has cited do not hold otherwise. They merely uphold other methods of service which in fact do not require the crossing of state borders for purposes of delivery of process. It is solely by such means that effective service of process may be had upon non-residents.

Petitioner argues that the type of notice contemplated by Rule 108 of the Texas Rules of Civil Procedure was "sufficient" to give the Texas trial court jurisdiction over the Respondent. Petition has cited no case which supports this proposition; the only apposite case cited by Petitioner holds directly to the contrary, namely, **Pennoyer, supra.** The basic and fundamental holding of **Pennoyer, supra,** is simply that

under our constitutional plan of government, process issued by a state's tribunal is ineffective when served beyond the territorial borders of that state upon a non-resident in an action in personam.

CONCLUSION

For the foregoing reasons, Respondent prays the Honorable Supreme Court of the United States to deny the Petitioner's Writ of Certiorari.

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for Respondent in Opposition to the Petition for a Writ of Certiorari was mailed to H. L. Hays, Jr., P. O. Box 5025 Abilene, Texas 79605 this....day of January, 1968.

.....
JOSH H. GROCE

....., 1968

APPENDIX

Art 2031(6) (Sec. 3) Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law regarding designation or maintenance of residence agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.

Art. 2039a (Sec. 5) No judgment by default shall be taken in any such cause or action, suit or proceeding, until after the expiration of at least twenty days after such process shall have been served upon the Chairman of the State Highway Commission as herein provided, and the presumption shall obtain, unless rebutted, that such process was transmitted by the Chairman of the State Highway Commission and received by the defendant after being deposited in the mail by the Chairman of the State Highway Commission.

Rule 108. Where the defendant is absent from the State, or is a non-resident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice

may be served by any disinterested person competent to make oath of the fact in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be indorsed on or attached to the original notice, and shall be in the form provided in Rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State.